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ABSTRACT

Much of the current public discussion in the United States about the Internet and speech rights focuses on the array of materials (particularly sexually explicit materials) that are available on the Internet, the effect of exposure to them on youth development, and whether the material should be regulated. In exploring questions about youth access to materials on the Internet, students learn that the general objective of law is to balance the interests of the state with the interests of the individual in the interest of some greater public good. They also learn how the law seeks to protect minors, regulates indecent speech, and has historically treated indecent and obscene speech. This resource guide offers an overview of the way the law has reviewed two classes of speech most relevant to the contemporary discussion of Internet obscenity and decency. The guide is divided into: (1) "How To Use This Resource Guide" (Learning Objectives; Organization of Guide); (2) "Permissible and Impermissible Speech" (First Amendment; Law and Cultural Concerns); (3) "New Media and Youth" (Media Impact on Youth; Internet Filtering; Comics and Movies); (4) "Indecent and Obscene Speech" (Nineteenth-Century Law; Comstock Law; Hicklin Standard; Early Twentieth-Century Law); (5) "U.S. Supreme Court" (Roth: First Contemporary Obscenity Tests; Contradictory Decisions; Pornography); (6) "Internet Speech" (Communications Decency Act of 1996; District Court Decision; U.S. Supreme Court Decision); and (7) "Child Online Protection Act of 1998" (Circuit Court Decision; Future for COPA). Chapters include notes. Attached are a timeline of relevant Supreme Court cases; online lessons, strategies, and teaching activities; lists of additional resources; and terms and vocabulary. (BT)

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Access Denied: Should Youth Access to the Internet Be Regulated?

A RESOURCE GUIDE FOR TEACHERS

Youth Summit ONLINE

SO033646

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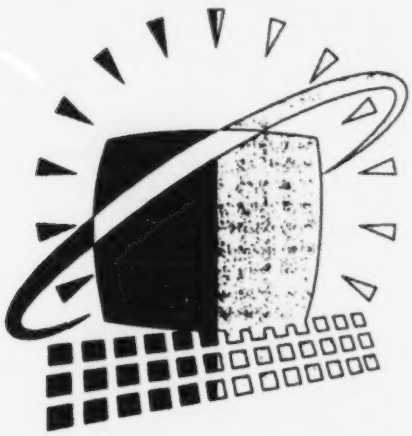

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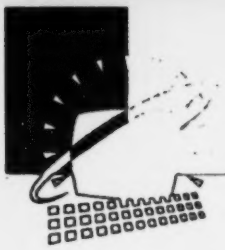

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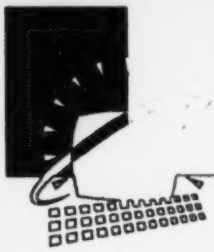

One: How to Use This Resource Guide

Much of the current public discussion in the United States about the Internet and speech rights focuses on the array of materials, particularly sexually explicit materials, that are available on the Internet, the effect of exposure to them on youth development, and whether the material should be regulated.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government of a redress of grievances.
>
> The First Amendment to the U.S. Constitution, 1791.

Learning Objectives

In a liberal democracy such as the United States, the tensions between the values of liberty and democracy are often contradictory. The liberal interpretation of the First Amendment that expression should be protected unless it infringes upon the rights of others may conflict with the value of protecting minors from representations of sexuality. Democracy supports the right of a majority to limit liberty for protective purposes. The relationship of obscenity, indecency, and social ambivalence towards representations of sexuality to the larger culture in the United States and the ways that public discussions about these social issues meet in the law offer a way to explore the conflict between values of liberty and democracy with students.

In exploring questions about youth access to materials on the Internet, students will learn that judicial review holds the potential to directly impact their lives. Students will learn that the general objective of law is to balance the interests of the state with the interests of the individual in the interest of some greater public good. They will also learn about the way in which the law seeks to protect minors, regulates indecent speech, and has historically treated indecent and obscene speech.

Organization of Guide

This publication is not an all-inclusive guide to First Amendment speech rights. It offers an overview of the way in which the law has reviewed the two classes of speech most relevant to the contemporary discussion of the Internet: obscenity and indecency. Detailed background about the law's protection of political and religious speech, as well as the protection of the press, may be found in most student textbooks.

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As noted in the Contents (see page iii), in addition to providing a brief, substantive survey about the classes of obscene and indecent speech as they were originally treated by English law through the way that they have been treated in contemporary American law (see sections Four–Seven), discussions of the following may be found in this guide:

(1) the intersection of law and cultural concerns (section Two); and

(2) new media and youth (section Three).

Also included are:

(1) **Time Line of United States Supreme Court Cases Relevant to Youth Access to the Internet** (see page 24);

(2) **Online Lessons, Strategies, and Teaching Activities** (see page 26);

(3) **Additional Teaching Resources** (see page 37); and

(4) **Terms and Vocabulary** defining concepts that students may encounter during further research (see page 41).

The teaching strategies presented may be conducted over several class periods and include several handouts.

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Two: Permissible and Impermissible Speech

Censorship of political speech can be traced back to 213 B.C., when China's first emperor, Shi Hwang-ti burned *The Analects* of Confucius (c. 551–479 B.C.) and most of the other books in China. In ancient Greece, the writers Aeschylus (c. 525–456 B.C.) and Aristophanes (c. 448–380 B.C.) were banned for questioning religious beliefs. The ancient Greek mathematician Pythagorus (c. 580–500 B.C.) was accused of blasphemy and forced to leave Athens because he began one of his books with the statement, "As for the Gods, I do not know whether they exist or not."[2] By 1792, 13 of the 14 states that had ratified the new U.S. Constitution had laws that made blasphemy and/or profanity illegal.[3]

> Bad meats will scarce breed good nourishment in the healthiest concoction; but herein the difference is of bad books, that they to a discreet and judicious reader serve in many respects to discover, to confute, to forewarn, and to illustrate.
>
> John Milton, from *Areopagitica*, 1644.[1]

The First Amendment

Many persons believe that the First Amendment to the U. S. Constitution protects speech, publications, or expressions of any kind. The right to speak freely is not an absolute freedom. An absolute freedom is a freedom that has no limitations. In the United States, most freedoms are not absolute. In general, in the United States, the free speech guarantee contained in the First Amendment is interpreted to mean that Congress will make no laws limiting speech, except when the need is so great that a law must be passed to address that need or when speech infringes on another right or freedom. Under certain circumstances, speech in its many forms is subject to regulation in the United States. In general, when considering speech issues, the law balances the interests of the state with the interests of the individual in the interest of some greater public good. For example, how much speech on the Internet should adults sacrifice in order to protect children? When does the interest of the child outweigh the interest of the adult? In recent years, the law has attempted to reconcile these issues.

The U.S. Supreme Court has decided that speech is not protected by the First Amendment if it: (1) encourages people to commit a crime; (2) takes the form of sexually harassing statements or violent threats; (3) advocates the overthrow of the government (referred to as *seditious speech*); or, (4) is *defamatory. Defamatory speech* is speech that injures a person's character or reputation through false and malicious statements. The law allows some defamatory speech about public officials because the framers of the Constitution believed that citizens and the press should be able to disagree with, publicly critique, and monitor the government without repercussions.

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Historically, obscene expression has not been protected by the First Amendment. In addition, under certain circumstances, indecent speech may be regulated to shield the young. It is these classes of speech—obscenity and indecency—that emerged as the focus of discussion about the types of speech that should not be permissible and accessible to youth on the Internet at the end of the twentieth century.

Law and Cultural Concerns

Throughout history, the limits of permissible expression have been defined and influenced by the cultural concerns and social standards of the time. Often, these standards and concerns have been shaped, in part, by a perceived threat to a way of life or a highly regarded social institution. At different moments and stages of a country's cultural development, different concerns, social standards, or perceived threats become prominent, and, at one time or another, have influenced interpretations of the law. For instance, during the era of the American Revolution (1763–1783) through ratification of the Federal Constitution (1788) and passage of the First Amendment (1791), proponents of speech rights believed that they were essential to religious toleration. The English philosopher John Locke's (1632–1704) articulation that being able to speak freely is essential to religious toleration is the foundation for the articulation in American political thought.[4] Thomas Paine, a political writer, published a pamphlet in England called *The Rights of Man* (1791–1792). In this pamphlet, Paine wrote that the "natural rights" of men included all "intellectual rights" and the "rights of the mind."[5] Even though different religions were tolerated in most of the English colonies (1578–1732), by law, the Church of England remained the official state religion. Persons who did not belong to the Church of England were arbitrarily taxed.[6]

During the same periods in American history, speech issues were discussed in terms of political rights and considerations. In England, common law traditionally punished *seditious libel*. *Seditious libel* was the English common law tradition of punishing people for criticizing government officials. In another instance of the way in which cultural concerns have been manifest in the law, after the Civil War (1861–1865) the "clear and present danger" principle was developed in response to concerns about threats to national unity and the authority of the federal government.[7] (See "Terms and Vocabulary" for discussion of "clear and present danger" and "common law.")

Also during the nineteenth century, middle-class Americans came to view childhood as a special time of life. They came to believe that children had special needs and that the state ought to look after their welfare. This perspective came to be reflected in the law in many arenas, including the arena of permissible and impermissible expression.

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Three: New Media and Youth

Much of the current public discussion in the United States about the Internet and speech rights focuses on the suitability for youth of the array of materials, particularly sexually explicit materials, that are available on the Internet, the effect of exposure to them on youth development, and whether the material should be regulated.

Media Impact on Youth

In October 1997, 79 percent of youth in grades 1–8 were using computers either at home or in school; 70 percent in grades 9–12 were using computers either at home or in school.[9] Little is known about the Internet and how it affects children. Other forms of mass media have been studied, most notably media violence, and, television violence in particular. Research has established that children recall more of what they see on television than do adults.[10] It also suggests that in young children there is a correlation among exposure to media violence, the number of hours of television viewed, and violent activity. The American Academy of Pediatrics recommends limiting children's exposure to television violence.[11] A study reported in the Academy's April 1998 issue of its journal, *Pediatrics*, reported that portrayals of violence in popular music videos could distort adolescents' expectations about conflict resolution, race and male-female relationships. The Academy has also released statements that televised violence has a clear and reproducible effect on the behavior of children.[12]

The number of sexual references or images on television equals television references to violence. The typical teenager views nearly 15,000 sexual encounters on television every year.[13] Although the effects on children of exposure to sexual references on the Internet are not known, many persons posit the theory that the Internet shares many of the same defining traits as television. A new federal law, the Children's Internet Protection Act (2000), requires libraries and schools to certify by July 2002 that they have adopted Internet filtering software that will block access to obscene materials, materials harmful to minors, or

> I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will always be rising between those that have, or at least pretend to have, on the one side, a concernment for the interests of men's souls, and, on the other side, a care of the commonwealth.
>
> John Locke, from *A Letter Concerning Toleration*, 1689.[8]

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child pornography—or lose federal grants for technology. The American Civil Liberties Union and American Library Association are challenging the portion of the law that affects libraries. Many states have passed similar laws.

Internet Filtering

Concerns over children's exposure to indecent or obscene material have led to the development of Internet screening and filtering software. Software may block access according to criteria established by a computer owner and cross-reference a list of known sites. It may look for certain words to decide what to block. The software can also block all Web sites with addresses containing character strings common to pornographic sites. Or Internet service providers may block certain portions of the Internet. Blocking software may also contain a list of sites containing pornographic material and block access to those sites. Its proponents have criticized blocking software for not inclusively blocking more material. It often does not screen sexually explicit images. Blocking software opponents have criticized it for blocking too much important information about topics such as birth control and breast cancer.[14]

Comics and Movies

The Internet is not the first new expressive medium to raise public concerns about its suitability for youth and its affect on youth development. During the 1940s and 1950s, comic books became popular with young people. Like the Internet, comic books became popular so quickly that people were not prepared for the popularity.[15] While the comics or "funnies" regularly published in newspapers and magazines continued to be wholesome, public concern was voiced about the emergence of crime comic books, which depicted acts of violence and sadism. In 1954, Dr. Frederic Wertham published the book *Seduction of the Innocent*, in which he argued that most comic books were harmful to children.[16] Criminologists, sociologists, and literary critics debated, with no real evidence for any position, whether comic books contributed to juvenile delinquency.[17] The 1954 U.S. Senate Subcommittee to Investigate Juvenile Delinquency held hearings about comic books. Although the subcommittee agreed that the crime, horror, and violence children were exposed to through comic books posed hazards, it rejected "all suggestions of governmental censorship as being totally out of keeping with our basic American concepts of a free press operating in a free land for a free people." Even so, the Comics Magazine Association of America (1954) established a *Comics Code Authority* to review and censor comic book stories. The authority guidelines prevented the portrayal of sex, adultery, divorce, drug use, corrupt authorities, or unpunished crime.[18]

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In their infancy, motion pictures were subject to censorship. The way that crime, sex, and religion were depicted was regulated, as was the use of profanity. In the 1915 case *Mutual Film Corp. v. Industrial Commission of Ohio,* 236 U.S. 230 (1915), the U.S. Supreme Court declared that motion picture censorship was constitutional. In 1934 the Motion Pictures Producers and Distributors of America Inc. adopted a production code to head off criticisms of film content.[19] Individual states set up movie censorship boards. In 1981, the last movie censorship board closed operations in Maryland.[20] Today, the Motion Picture Association of America (MPAA) has established a movie rating system. Films that do not receive ratings from the MPAA ratings board often have difficulty finding distributors.

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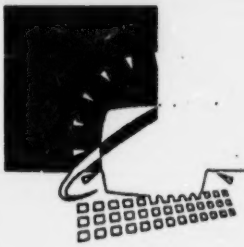

Four: Indecent and Obscene Speech

In most countries, producing or publishing obscene materials was not a major criminal consideration until relatively modern times. In England, for example, until the nineteenth century, speech restrictions were applied mostly to anti-religious or seditious acts or publications. The production and distribution of obscene material did not become a statutory crime in Great Britain until 1857 with the passage of the Obscene Publications Act by the British Parliament.[22] Although the importation of obscene literature was prohibited in the United States by the Tariff Act of 1842, and some states did pass anti-obscenity legislation before the Civil War (1861–1865), there are very few recorded obscenity cases until after the war was concluded.[23]

> That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.
>
> John Stuart Mill, from *On Liberty*, "Introduction," 1859.[21]

Nineteenth-Century Law

During the late nineteenth century, the law began to look at speech issues related to public decency and obscenity. During the forty years after the Civil War (1861–1865), the structure of the family, social life, and the ways that persons made their living rapidly changed. The United States experienced its Industrial Revolution. Historians refer to this period as America's "Gilded Age." It was a time of middle-class growth. Outwardly, society appeared prosperous. Under close examination, critics found that prosperity was not shared by everyone. Many persons, particularly in urban areas, lived in a sort of underworld where difficult social conditions led to widespread poverty.[24] It was a time of great social and economic displacement and uncertainty.

Many reformers responded to the changes in American society and the attendant social displacement by formulating legal cause-specific responses as remedies. In truth, many factors were responsible for the displacement, but some reformers believed that a failure to apply moral values in both public and private life were responsible for societal problems. Anti-vice societies were organized in England and the United States.[25] These societies worked for labor laws, prison reform, temperance, and welfare programs for the poor. They also worked for federal obscenity and indecency legislation.[26]

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The Comstock Law

In 1873, the New York Society for the Suppression of Vice secured the passage of the Federal Anti-Obscenity Act. The legislation used the U.S. Postal Service to enforce standards of public decency, seize obscene materials that were sent through the mails, and made it illegal to mail information or devices related to birth control or abortion. The act did not define obscenity.[27] It stated that "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance..." sent through the mail would be punished by fines or imprisonment.[28] At the time, even many of the pioneering women who fought for the vote for women in the United States believed that birth control would lower a woman's social and legal standing—which were defined in sexual and reproductive terms.[29] The law came to be known as the Comstock Law. Anthony Comstock, founding member of the New York Society for the Suppression of Vice, was the first special agent appointed to the U.S. Postal Service to enforce it.[30] The Comstock Law was the first piece of national legislation to make obscene expression illegal.

The Comstock Law was not widely discussed in the context of free speech or seriously questioned until the second decade of the twentieth century. The only organized opposition came, first, from the National Defense Association (1878), which helped those prosecuted for violations, and, later, from the Free Speech League (1902), an organization that mostly focused on protecting political speech.[31]

When the Comstock Law was passed, Americans believed in the legal principle that maintaining public decency should be within a community's self-policing powers.[32] This idea endures in the law today. United States Supreme Court decisions during the twentieth century about obscenity all include references to tests to determine obscenity based on "community standards."

A form of the Comstock Law still exists; it has been altered very little.[33] One hundred years after the Comstock Law was passed, the U.S. Supreme Court decided in *Hamling v. United States*, 418 U.S. 87 (1974), that a mailed brochure advertising a federal report, *The Illustrated Presidential Report of The Commission on Obscenity and Pornography*, violated the law.[34]

The Hicklin Standard

During the earliest consideration of obscenity, public concern focused on its effects on those who were exposed to it.[35] Until the mid-twentieth century, American law followed the English legal principle referred

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to as the "Hicklin standard" for obscenity. The Hicklin standard originated with an 1868 English case, *Queen v. Hicklin*, L.R. 3 Q.B. 360, 371 (1868).[36] The test for obscenity from *Queen v. Hicklin* (1868) was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[37]

While the Hicklin standard was used, a judge took three factors into consideration. First, the bad tendency of a book or publication—not the intent of the author or seller—determined whether it was obscene or indecent.[38] Second, judges need not look at a work as a whole to make a determination; they could render a decision based on a particular passage.[39] Third, the possible effect the work might have on youth or persons who were considered to be "impressionable" was always considered.[40] This doctrine became the foundation for determining obscenity as it was interpreted in the application of the Comstock Law.[41] Minors, the lower classes, and women were the impressionable populations referred to in the standard.[42]

The Hicklin standard would ensure that discussions of decency or obscenity would be forever tied to the potential effect of indecency or obscenity on youth—a consideration that still echoes in the law in the present day.

Early Twentieth-Century Law

During the early twentieth century, judges in the state, district, and federal appeals courts began to question the contemporary relevance of two of the criteria established through the Hicklin standard. Judge Learned Hand of the Southern District of New York was one of the first judges in the United States to question them.[43] In his decision about a 1913 case, *United States v. Kennerly*, Hand wrote that he believed that he was obliged to follow the precedent established by previous courts in applying the Hicklin standard, but his decision also questioned its continued relevance and suggested that it might be outdated.[44]

It was a case about the novel *Ulysses* by James Joyce, *United States v. One Book Called "Ulysses,"* 72 F.2d 705 (2d Cir. 1934), that led Judge John Woolsey of the District Court of New York to express doubts similar to those raised by Judge Hand in *United States v. Kennerly* (1913) about the contemporary relevance of the Hicklin standard. Woolsey suggested a new standard of public decency and obscenity. He read the entire novel and decided that its "Unusual frankness" was "sincerely motivated" and an honest attempt at a "slice of life." He suggested that a book as a whole and the intent of the author be taken into consideration in future obscenity cases. He also suggested that the literary, scientific, or educational merit of a book also

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should be considered. Since the merit of a work was relevant, the testimony of experts about an author's art were relevant to these cases.[45] Today, *Ulysses* is considered a classic work of English-language literature.

In *Parmelee v. United States*, 113 F.2d 729 (D.C. Cir. 1940), the courts offered standards more in keeping with the times. A Washington bookseller named Parmelee wanted to import six copies of an art history book called *Nudism and Modern Life*, challenging the Comstock Law. The court decided that the most useful test was the one proposed by Hand in *United States v. Kennerly* (1913): "Should not the word obscene be allowed to indicate the present critical point in compromise between candor and shame at which the community may have arrived here and now?" The court decided that if a picture, viewed in context, did not defy current standards of candor, circulation should be permitted.[46]

The *Kennerly*, *Ulysses*, and *Parmelee* decisions led to the rejection of the Hicklin standard by the U.S. Supreme Court.[47] They also raised issues that would prove difficult for the U.S. Supreme Court to resolve as it came to increasingly consider obscenity cases in the second half of the twentieth century. Namely, what is obscenity and who should determine the community standards by which to judge it, or what Judge Woolsey identified as "the present critical point between candor and shame"?

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While obscene speech has long been impermissible under U.S. law, speech that is "indecent" has been viewed as a class of speech distinct from obscenity and under some circumstances is protected. (See "Time Line of United States Supreme Court Cases.") The Supreme Court has ruled, however, that materials that are "harmful to minors" may be regulated by the state. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Supreme Court found that a New York statute banning the distribution of material harmful to minors was constitutional. The Supreme Court reaffirmed the principle established in previous case law that the state has an interest in the well-being of young people and in protecting them. In *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978), the U.S. Supreme Court upheld a Federal Communications Commission (FCC) sanction against a radio station that broadcast a comedy routine by George Carlin about the seven "filthy words" that are kept out of polite conversation. In the routine, Carlin repeatedly used the seven words. The broadcast occurred during the evening rush hour. A parent driving with his children heard the broadcast on his car radio and filed a complaint. The Supreme Court found that in the interest of public welfare, broadcast speech need not be obscene to be regulated. The Supreme Court found that the FCC, which regulates aspects of broadcast media, might take into account the time of day and the likely audience when sanctioning indecent speech. However, in *Butler v. Michigan*, 352 U.S. 380 (1957), the U.S. Supreme Court also found that the state cannot reduce the adult reading public to reading only what is fit for children.

Where did the term "The Gilded Age" originate?

The term "The Gilded Age" came from Mark Twain's first novel, *The Gilded Age* (1873), a satire about the post-Civil War era, co-written with Charles Dudley Warner.

Roth: First Contemporary Test

Historically, the cultural concerns and social standards of the times have influenced tests for obscenity. Today, birth control advertisements regularly appear in magazines and even on television. In 1913, Margaret Sanger, who would later become the first effective national advocate for the social and medical benefits of birth control, was censored under the Comstock Law for writing columns in the *New York Call* about syphilis and gonorrhea. She was also indicted for publication of three issues of a monthly newsletter in 1914 called *The Woman Rebel (U.S. v. Margaret Sanger*, U.S. District Court, Southern District of New York, 1914). Her husband, William Sanger, was arrested for giving a copy of a pamphlet authored by his wife called "Family Limitation" to an undercover agent, and sentenced to 30 days in jail. The Free Speech League was involved in defending the Sangers.[48]

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From 1957 to 1973, the U.S. Supreme Court attempted to confront the questions raised by the obscenity decisions of state and federal courts in a series of contradictory decisions. (See "Time Line of United States Supreme Court Cases.") Voting in only one of these decisions, *Roth v. United States*, 354 U.S. 476 (1957), was 6-3. More often than not, votes of 5-4 were cast and involved issuance of as many as five separate opinions that disagreed on particular aspects of the law. Many of the disagreements focused on the issues of community standards and the extent of permissible expression with respect to representations of sex in terms of the U.S. Supreme Court's decision in *Roth v. United States*, 354 U.S. 476 (1957).

Legal historians have interpreted *Roth* as establishing three criteria to test for obscenity. To be found obscene, the Roth decision found that material must have the following traits: (1) the dominant theme of the material taken as a whole must appeal to a prurient interest in sex; (2) the material must be patently offensive because it affronts contemporary community standards relating to the description of representations of sexual matters; and (3) the material must be "utterly" without redeeming social value.[49]

Contradictory Decisions

In the case *Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964), which generally upheld the *Roth* test, U.S. Supreme Court Justices Brennan and Goldberg issued an opinion arguing that, to be found obscene, a work must go "substantially beyond customary limits of candor in description or representation." Legal historians have interpreted their opinion as advocating a permissive interpretation of the *Roth* test. The justices also concluded that community standards referred to national standards.[50]

On the other hand, U.S. Supreme Court Justices Warren, Harlan, and Clark issued a separate opinion arguing that different communities ought to be able to set different standards, which was criticized by commentators at the time as being unworkable because of the federal government's jurisdiction over interstate commerce.[51] Supreme Court Justice Burger acknowledged the Supreme Court's trouble between 1957 and 1973 with what Justice Harlan called "the intractable obscenity problem" in the decision that he wrote for the obscenity case *Miller v. California*, 413 U.S. 15 (1973). In *Miller*, the Supreme Court reaffirmed that obscenity is not protected by the Constitution and modified the tests for obscenity outlined in *Roth* and *Memoirs*. The factors to be established by *Miller* were (1) that the average person, applying contemporary community standards, would find a work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined to be offensive and "hard core" by the applicable state law; and (3) that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[52]

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In the decision for *Miller,* Justice Burger noted that no majority of the Supreme Court since 1957 "had been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the State's police power." In 1957, all Supreme Court Justices agreed that obscenity was not protected by the First Amendment. By 1973, however, Justice Brennan had reversed his former position in support of the 1957 *Roth* test for obscenity and argued that neither the Supreme Court nor Congress, nor the states could make a distinction between unprotected obscene material and expression protected by the First Amendment and that the Supreme Court ought to focus on protecting unconsenting adults and juveniles from obscene materials.[53] These two ideas of Justice Brennan's would be incorporated into the Communications Decency Act of 1996.

The contradictions in the U.S. Supreme Court decisions about obscenity between 1957 and 1973 were also noted in 1973 by Justice William Brennan in a joint opinion for *Miller v. California,* 413 U.S. 15 (1973), and *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973). He argued that differences amongst justices beginning in 1967 led them to use their own individual standards to overturn convictions if five justices thought that the convictions should be overturned—and that the Supreme Court had provided no real direction in defining standards for obscenity when the Supreme Court's decisions between 1957 and 1973 were reviewed as a whole. The standards in *Miller,* Brennan argued, did not provide clarification. He described the significant differences amongst the justices about obscenity. Some had consistently maintained that government should have no control over speech of any kind. Others believed that the state should be given great leeway in setting obscenity standards. Others believed that only "hard core pornography" should be controlled, but no one seemed to know how to define it.[54]

Pornography

After 1974, states and cities began to focus on regulating obscenity rather than doing away with it completely, especially when it came to exposure to children. No one seemed to know what obscenity was, but most people could agree about what constituted "adult entertainment" or pornography. Cities began to regulate the location of "adult theaters" by ordinances and created "zones" for adult entertainment. Child pornography became the focus of legal concerns. *New York v. Ferber,* 458 U.S. 747 (1982), was the first time a case involving child pornography was considered by the Supreme Court. The U.S. Supreme Court unanimously supported the state's argument that child pornography was a serious menace to society and ruled that the states should be given a great deal of power to prosecute it.[55]

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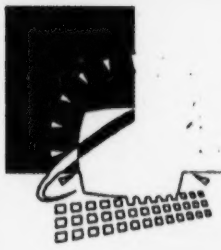

Six: Internet Speech

> There is nothing which causes so much laughter or calls forth so many joking comments by people in Europe as Comstockery in America.
>
> Margaret Sanger, from *Comstockery in America*, 1915.[56]

The Communications Decency Act (CDA) was the first attempt by the U.S. Congress to regulate indecent or obscene material on the Internet. The CDA was passed in 1996 in response to complaints about materials on the Internet, but unlike other legislation, without accompanying testimony of experts at congressional hearings.

Communications Decency Act of 1996

One provision of the CDA made it a crime (punishable by a fine, by imprisonment for up to two years, or both) to transmit obscene or indecent communications to a recipient known by the sender to be under 18. A second provision made it a crime to use an interactive computer service to make available any patently offensive communication to a person under the age of 18. The law applied to all computer-assisted telecommunications, e-mail, Web sites, and chat rooms, the Web and the Internet, and to interstate and foreign communications. A *patently offensive communication* was defined as communication that "depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[57]

The CDA clearly applied to the Internet. It prompted two lawsuits in federal district court, both alleging that it violated the free speech guarantee of the First Amendment. One suit was filed by Internet access providers, including America Online, Prodigy, and Microsoft; the other was filed by individuals and groups that make information available on the Internet, including nonprofits such as the Critical Path AIDS Project, Human Rights Watch, and the American Library Association. The CDA restriction on indecent speech was constitutionally problematic; indecent communications can be regulated, but not banned, to protect minors.

District Court Decision

The United States District Court for the Eastern District of Pennsylvania consolidated the cases for decision. The three-judge panel unanimously ruled that the CDA violated the free-speech rights of those providing access to and information on the Internet. In reaching their decision, the judges noted that there is no existing technology that allows Internet access providers and those who post information on the Internet to reliably determine the age of users. The tools that are available—credit card verification and passwords—are too expensive for many noncommercial information providers. The district court also

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noted that various software blocking and filtering products are on the market and available to parents and anyone else who wishes to block access to unwanted information and communications.[58]

U.S. Supreme Court Decision

In 1997, the U.S. Supreme Court considered the case *Reno et al. v. American Civil Liberties Union et al.*, 521 U.S. 844 (1997), on appeal. Indecent material for adults, unlike obscene material, is protected by the First Amendment. In its 7-2 decision, the Supreme Court upheld the decision of the U.S. District Court for the Eastern District of Pennsylvania that the two statutory provisions of the CDA that restricted indecent and "patently offensive" speech were unconstitutional. Historically, the print media in the United States have received the greatest First Amendment protection, while broadcasting has invoked the greatest restrictions.[59] Indecent speech is protected by the First Amendment but may be regulated on the radio or television to protect children. One of the questions raised by the Internet is, which medium is it akin to—broadcast or print? The U.S. Supreme Court agreed with the federal court decision, establishing First Amendment protections for the Internet similar to those of print media.[60] The U.S. Supreme Court held that its past decisions permitting the government to regulate indecent broadcast communications do not apply to this case. Broadcast communications, the U.S. Supreme Court decided, have an invasive quality—without warning a listener or viewer can come upon offensive speech. It takes no special skill or sophistication to do so; one need only tune in. This meant that children, including very young children, could easily encounter potentially harmful radio and television programming.[61] (See "Time Line of United States Supreme Court Cases.") The U.S. Supreme Court noted that the user controls exactly the sites or information to be accessed on the Internet. Testimony before the district court indicated that almost no user would stumble upon an offensive Web site or other communication. In the Supreme Court's view, this meant that the typical child would not be at risk of stumbling across indecent or patently offensive material just by turning on the home computer.[62]

The U.S. Supreme Court also concluded that both the term *indecent* and the term *patently offensive* were vague. It was not clear what was prohibited. The vagueness of the terms raised the real risk that they would be applied to speech that is clearly protected by the First Amendment. And because the CDA imposed substantial criminal penalties, there was a real likelihood that persons would be deterred from speaking via the Internet in order to avoid the specter of prosecution. This meant that even protected speech is jeopardized because speakers will opt not to speak because of fear of prosecution.[63]

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The U.S. Supreme Court next concluded that the CDA suppressed speech that adults had a constitutional right to engage in with each other.[64] The Supreme Court noted that products are available that can keep such protected speech from children. Because of the availability of blocking products, the CDA could not be deemed narrowly tailored to suppress as little protected speech as possible.[65] Laws that regulate constitutionally protected activities are often subject to what is referred to as the "strict scrutiny" or "least restrictive means" test. A law may be declared unconstitutional under this test if its basic purpose can be fulfilled through less restrictive strategies.

What is comstockery?

The noun *comstockery* was coined from the name of the nineteenth-century crusader Anthony Comstock, who is sometimes referred to as the "father" of modern censorship in the United States. Comstockery is censorship of obscene materials or condemning alleged immorality.

The U.S. Supreme Court was also troubled by the possibility that the content of the Internet would become limited to that acceptable in the least tolerant communities. An Internet publisher is not the same as a print publisher or movie producer; print publishers or movie producers can choose where to distribute a book or movie. The Internet is available to all, and the possibility of prosecution in a less tolerant town would limit the material available to everyone, even those in places that are more tolerant.[66]

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> YOU don't know about me without you have read a book by the name of *The Adventures of Tom Sawyer;* but that ain't no matter. The book was made by Mr. Mark Twain, and he told the truth, mainly. There was things which he stretched, but mainly he told the truth.
>
> From Chapter 1, *Huckleberry Finn* by Mark Twain, the fourth most frequently challenged book in the U.S. from 1990 to 2000.[67]

Although the U.S. Supreme Court's decision in *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997), nullified the first attempt by the U.S. Congress to regulate the Internet, in October 1998 President Clinton signed into law the Child Online Protection Act (COPA).[68] To address the Supreme Court's decision that terms in the CDA were too vague, COPA sought to define most of its key terms. COPA also limits its application to commercial entities on the Web. Chat rooms, bulletin boards, and ordinary e-mail would be unaffected. Specifically, the bill prohibits commercial distribution of material that is "harmful to minors" (persons under 17 years of age).[69] Its definition of materials that are harmful to minors bears a general similarity to the criteria of obscene speech from *Miller v. California* and relies on the application of contemporary community standards to determine what materials are harmful to minors.

Circuit Court Decision

The U.S. District Court for the Eastern District of Pennsylvania unanimously found COPA unconstitutional. The case was considered by the U.S. Court of Appeals for the Third Circuit, which upheld the decision on June 22, 2000.[70]

The U.S. Court of Appeals for the Third Circuit based its decision on the premise that relying on contemporary community standards to identify material harmful to minors would not stand the test of constitutionality because Web publishers cannot restrict access to their sites based on the geographic location of the site's users. Because there is no way to restrict access to material by geographic regions, Web publishers would be required to comply with the most restrictive community's standards, and no technology currently exists that will protect Web publishers from liability. In practice, Web publishers would unnecessarily self-censor. The U.S. Court of Appeals for the Third Circuit noted further that no evidence exists that adults everywhere agree on what materials are harmful to minors, which would also make standards difficult to establish.[71]

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The Future for COPA

On May 21, 2001, the U.S. Supreme Court agreed to review during its October 2001 term the decision issued by the U.S. Court of Appeals for the Third Circuit about COPA.[72]

Will the U.S. Supreme Court uphold the circuit court decision? Interest groups on both sides of the issues are busy issuing reports, *amicus* briefs, and giving media interviews. (See "Terms and Vocabulary" for discussion of *amicus curiae brief.*) On the one hand, opponents of the law are polishing their arguments that the bill will be ineffective because (1) it does not apply to materials from other countries; (2) it is not the least restrictive means to its end; (3) it will have a chilling effect on speech; and (4) it is vague.[73]

> As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.*
>
> Justice Steven Breyer, U.S. Supreme Court, *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).[75]

On the other hand, proponents are refining their arguments that (1) COPA uses an existing and constitutionally valid definition of "harmful to minors" to limit access to material that is not protected speech for youth; (2) it would not prevent adult customers from viewing "adult" areas on commercial Web sites; (3) the standard for what must be restricted from children is a constitutionally valid test for "harmful to minors"; and (4) it represents the least restrictive means of protecting minors from material that is obscene and harmful for them and not protected for sale or display to them.[74]

Shielding minors from indecent, obscene, or harmful materials on the Internet will continue to be debated. No one disputes that the government has a compelling interest in the welfare of the country's children. How the U.S. Supreme Court will balance First Amendment rights for adults with the welfare of children in the relatively new medium of the Internet remains to be seen.

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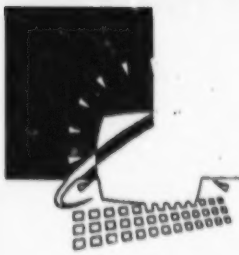

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75. See Justice Steven Breyer, *Reno, Attorney General of the United States et al. v. American Civil Liberties Union et al.*, 521 U.S. 844 (1997).

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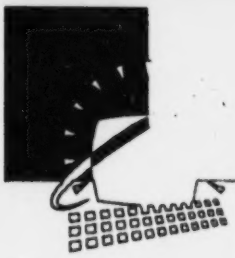

Time Line of United States Supreme Court Cases

Time Line of United States Supreme Court Cases Relevant to Youth Access to the Internet

1877 *Ex parte Jackson*, 96 U.S. 727 (1877)

This case established the precedent permitting the U.S. government to seize obscene materials sent through the mail and to prosecute the mailers. The Supreme Court ruled that since the U.S. government owns the postal service, it may impose conditions with respect to the content of materials carried through the mail.

1948 *Winters v. New York*, 333 U.S. 507 (1948)

The Supreme Court decided that a legislative body may limit speech when a community calls for it, if the limits do not infringe upon constitutional protections for speech and are defined with "appropriate definiteness." The Court reversed the conviction of Winters, a bookseller, for possession of magazines containing crime stories and pictures, finding that the New York statute against obscene prints and articles was vague.

1957 *Roth v. United States*, 354 U.S. 476 (1957)

The Supreme Court upheld in a 6-3 decision the legal principle that obscene speech was not protected by the Constitution. The Court found that "to the average person applying contemporary community standards, the dominant theme of the [*obscene*] material taken as a whole appeals to prurient interests." The decision noted that sex was not "synonymous" with obscenity. Obscenity is "utterly without redeeming social value." The case involved materials sent through the mails, upholding the lower court convictions.

***Butler v. Michigan*, 352 U.S. 380 (1957)**

This decision established a precedent that prohibits restricting adult access to materials that are deemed inappropriate for children. The decision stated that the law cannot "reduce the adult population to reading only what is fit for children." The Supreme Court decided that a Michigan law prohibiting the sale of publications that might be inappropriate for youth was unconstitutional, reversing the decision of the lower court.

1964 *Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964)

The decision in this case restated the *Roth* test for obscenity. Supreme Court Justices Brennan and Goldberg also held that, to be obscene, speech must go "substantially beyond customary limits of candor in description or representation." They concluded that community standards referred to national standards. Justice Warren, joined by Justices Harlan and Clark, argued that different communities should be able to set different standards. The case involved a movie, Louis Malle's *The Lovers*, and overturned the lower court ruling that the movie was obscene.

1966 *Memoirs v. Massachusetts*, 383 U.S. 413 (1966)

In this decision, the Court restated the test for obscenity in *Roth*, as it believed it to have been elaborated in subsequent cases. The test for obscenity must establish three criteria: (1) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (2) the material is patently offensive because it affronts contemporary community standards relating to the description of representations of sexual matters; (3) the material is utterly without redeeming social value. The Court case involved the book *Fanny Hill*, banned in Boston. The obscenity charge was overturned.

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1968 *Ginsberg v. New York*, 390 U.S. 629 (1968)

The U.S. Supreme Court found that a New York statute banning the distribution of material to minors that was harmful to them was constitutional. The Court reaffirmed the principal established in previous case law that the state has an interest in the well-being of young people and in protecting them.

1973 *Miller v. California*, 413 U.S. 15 (1973)

The Supreme Court reaffirmed that obscenity is not protected by the Constitution and modified the tests for obscenity in *Roth* and *Memoirs*. The factors to be established by *Miller* were (1) that the average person, applying contemporary community standards, would find a work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined to be offensive and "hard core" by the applicable state law; and (3) that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. The case involved obscene material distributed through the mail.

***Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973)**

In a 5-4 decision, the Supreme Court decided that obscene films are not constitutionally protected even when they are for adults only. The Court decided that adult access to materials was not always beyond the scope of government regulation. The case involved the showing of allegedly obscene films that included warnings about content and required viewers to be at least 21. The Court upheld the lower court decision that the sale and delivery to adults of obscene material is not protected by the First Amendment.

1978 *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978)

The U.S. Supreme Court upheld an FCC sanction against a radio station that broadcast a comedy routine by George Carlin about seven "filthy words" during the evening rush hour. The Court found that in the interest of public welfare, broadcast speech need not be obscene to be regulated and that the time of day and the likely audiences are appropriate to consider in determinations of sanctions.

1982 *New York v. Ferber*, 458 U.S. 747 (1982)

The U.S. Supreme Court unanimously supported the state's argument that child pornography was a serious menace to society in its first examination of a state law targeting child pornography, finding that the New York law did not violate the First Amendment. The Court found that the state's interest in preventing the sexual exploitation of minors (children under 16) and protecting them from the abuses associated with pornography was a "compelling government objective."

1997 *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997)

The Supreme Court found that the Communications Decency Act unconstitutionally burdened adult speech by prohibiting indecent expression. The act prohibited knowingly making available obscene or indecent speech transmitted through a telecommunications device to a person under 18. The Court found that the act suppressed a range of constitutionally protected speech for adults.

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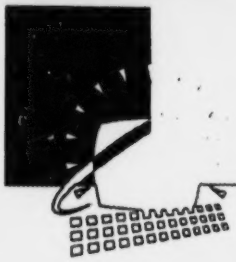

Online Lessons, Strategies, and Teaching Activities

This section includes references to and descriptions of nine online lessons that may be downloaded from a variety of Web sites that provide materials for teachers. In addition, one complete, step-by-step strategy "Restricting Youth Access to Indecency on the Internet: Teaching Strategy," is provided. It may be completed in 1–2 class periods. Step-by-step suggestions for five additional activities, "Freedom of Speech on the Internet: Teaching Activities," which might extend over several days, is also provided.

Online Lessons

Please note: URLs change over time with Web site reorganizations. Contact information provided where appropriate below.

New York Times Learning Network Lessons Archives

The following four lesson plans may be downloaded along with the companion articles to be used with the lessons. Each lesson plan includes the following: overview; suggested time allowance; objectives; resources and materials needed; activities and procedures; further questions for discussion; evaluation and assessment; vocabulary; extension activities; interdisciplinary connections; and other information on the Web. Search the archives or go to the lessons directly as indicted below. New York Times Learning Network: http://www.nytimes.com/learning/index.html

Assessing When and If the Media Should Be Regulated for Children: A Lesson for the Civics Classroom

http://www.nytimes.com/learning/general/featured_articles/990621monday.html

Students participate in a round-table discussion regarding the regulation of different media that can contain violent content, and then interview both adults and children in order to compare their views on these issues.

The First (and Last) Words: Applying the First Amendment to Internet Issues (Grades 6 to 12)

http://www.nytimes.com/learning/teachers/lessons/990125monday.html

Students participate in a round-table discussion of these issues, as well as develop, distribute, and analyze the results of a survey about Internet regulations and the applications of the First Amendment in a technological society.

Internet Filter Infiltration: Exploring Internet Filters and Creating School Internet Policies (Grades 6 to 12)

http://www.nytimes.com/learning/teachers/lessons/991111thursday.html

Students work in small groups to survey people in the school community (students, parents, teachers, administrators, and school board members) about school Internet filters and draft an Internet policy based on the survey results.

Television CensorChip: Investigating V-Chip Technology and the Television Rating System (Grades 6 to 12)

http://www.nytimes.com/learning/teachers/lessons/991104thursday.html

Students work in small groups to define television content descriptors for different age groups and com-

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pare those definitions to the official television rating system. They develop, distribute, and analyze a survey related to media topics.

Censorship and *The Adventures of Huckleberry Finn* by Mark Twain (Grades 9–12)
http://www.sdcoe.k12.ca.us/score/huckcen/huckcentg.html
Teacher CyberGuide from the San Diego County Office of Education
This unit provides resources for students in American Literature classes to explore the controversy of teaching and reading of *The Adventures of Huckleberry Finn*.
Cyberguides main page: http://www.sdcoe.k12.ca.us/score/cyberguide.html

Pornography Debate (Grade 12)
http://ofcn.org/cyber.serv/academy/ace/soc/cecsst/cecsst054.html
From the Academy Curricular Exchange, Columbia Education Center
The purpose of this activity is to provide students with insights into the complexities of protecting the individual's right of expression.
Academy Curricular Exchange main page: http://ofcn.org/cyber.serv/academy/ace/

Symbolic Speech: An Ask *ERIC* Lesson Plan (Grade 9)
http://askeric.org/cgi-bin/printlessons.cgi/Virtual/Lessons/Social_Studies/US_History/USH0026.html
The purpose of the lesson is to show students the role of the Supreme Court in respect to interpreting the law. Please note: AskERIC, a project of the ERIC Clearinghouse on Information and Technology, is an Internet-based service providing information to educators. ERIC is a federally funded national information system that provides a variety of services on education-related issues. ERIC Clearinghouse on Information & Technology, 621 Skytop Road, Suite 160, Syracuse University, Syracuse, New York 13244-5290, Phone: (800) 464-9107.
AskERIC main page: http://ericir.syr.edu/v

Talk of the Times: Debating the Limits of Free Speech (Grades 4–10)
http://encarta.msn.com/alexandria/templates/lessonFull.asp?page=836v
From Microsoft® Encarta® Schoolhouse
Students will study the history of freedom of speech in the United States. They will then engage in a debate about Communications Decency Act of 1996.
Microsoft Encarta Schoolhouse Teachers page: http://encarta.msn.com/Teachers/v

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Restricting Youth Access to Indecency on the Internet: Teaching Strategy

This strategy for secondary grade levels focuses students' attention on the 1997 U.S. Supreme Court decision that the Communications Decency Act of 1996 violated the First Amendment right to free speech. The strategy might be completed in 1–2 classes.

Objectives

As result of this lesson, students will

- Identify First Amendment protections as they relate to Internet communications;
- Define requirements necessary to restrict speech on the basis of its content;
- Identify how overbroad restrictions on speech limit protected speech;
- Identify how vague laws restricting speech chill the free exercise of speech;
- Analyze conflict between governmental interest in protecting youth from indecent materials and individuals' interest in free speech in the Supreme Court decision *Reno v. ACLU*; and
- Develop viewpoints about the Supreme Court decision.

Procedures

1. To present an overview of the Internet, brainstorm with students the various ways to communicate over the Internet. The list should include electronic mail (e-mail), automatic mailing list services (list serves), newsgroups, message boards, chat rooms, and the World Wide Web. If necessary, define basic Internet components. Note, too, that new components are developing regularly.
2. Ask students which of these components they have ever used. This will provide a sense of the scope and widespread use of the Internet.
3. Explain that text, pictures, videos, and discussions of sexually explicit materials exist on the Internet and are posted in the same way as nonsexual materials. Also point out to students that Congress enacted its first piece of legislation regulating the Internet in 1996, when it criminalized the sending and displaying to minors of indecent and patently offensive materials. Tell students that they will be doing a case study that focuses on whether this federal statute violates the right to free speech.
4. Distribute *Unmarked Opinion Case Study Handout*, and ask students to read it. Brainstorm the important facts with students and write them on the board. Once the facts are clear, instruct students to read Opinions A and B.
5. Ask students whether they personally agree with Opinion A or Opinion B. Organize the class into groups of up to five students according to the opinion that they agree with. In the event that all students support the same opinion, assign each group to one opinion or the other.

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6. After students have discussed the opinions, ask each group to assign a recorder to write down the arguments and a reporter to present the arguments to the class. Have the groups: (a) identify and record the arguments cited in the opinion; (b) add their own; and (c) rank all arguments from most important to least important.
7. Allow a debate of the case by having one student from each group report on the group's most important argument. Allow students to add new arguments as the debate proceeds. As students present their arguments, keep track of the arguments made.
8. Debrief the discussion with students once their arguments have been exhausted by identifying the arguments made and responding to them as the Supreme Court did. Let students know that Opinion A includes arguments made from the government's brief and the dissenting opinion in *Reno v. ACLU*, 117 S. Ct. 2329 (1997). Opinion B is the majority opinion of the Supreme Court.
9. Clarify with students the tests the courts use to determine when restrictions based on the content of speech are imposed by the government. Make sure students understand that the government can limit this speech on the basis of its content only when the government has a compelling state interest in limiting speech and its efforts are narrowly drawn to address that problem. Statutes that restrict unprotected speech along with constitutionally protected speech are overbroad and can be struck down for that reason. Statutes that make it a crime to speak must be very specific and clear about what speech is criminal and what is not. Otherwise, the statute can be struck down as vague.
10. Ask students whether or not "indecency" is a problem on the Internet and what steps they might take if they believe that it is a problem.
11. As an extension activity, students might draft a piece of legislation relating to the Internet, taking into account the concerns expressed by the Supreme Court in striking down the 1996 statute.
12. Students might explore the issue further after this lesson by doing some online research about the Child Online Protection Act of 1998.

This strategy originally appeared in *Update on Law-Related Education*, 22.2, 1998, pp. 41–45. © 1998 American Bar Association. It was developed by Margaret E. Fisher.

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The Facts

Congress passed the Communications Decency Act of 1996 to limit minors' access to indecent and obscene transmissions and patently offensive displays on the Internet. This ban applies to commercial and noncommercial groups and individuals using any of the components of the Internet: e-mail, list serves, newsgroups, chat rooms, and the World Wide Web. This statute makes it a felony for anyone to (1) knowingly use a telecommunications device to transmit obscene or indecent messages to anyone under 18 years of age, or (2) use an interactive computer service to knowingly send or display sexual or excretory activities or organs in patently offensive ways to anyone under 18 years of age. Patently offensive communication is measured against contemporary community standards.

People charged under this law could claim one of two defenses: (1) they had used good faith, reasonable, effective, and appropriate actions to prevent minors from getting access to the indecent material; or (2) the operator required verified proof of age, for example, a credit card or other adult access number.

On the day that President Clinton signed the bill into law, the ACLU, along with other users and providers, filed a lawsuit claiming the law violated the First Amendment right to free speech.

A special three-judge district court ruled that the statute violated the right to free speech. The government appealed the decision of the district court to the U.S. Supreme Court.

Opinion A

The Communications Decency Act is plainly constitutional. The Internet offers a forum for true diversity of political discourse and unique opportunities for cultural development. However, the same technology that makes all these wonderful resources available by the click of a mouse also allows the worst, most vile, and most perverse pornography. Without some basic rules, the increasing use of the Internet will allow easy accessibility to sexual material that would harm children.

Children are increasingly becoming the computer experts in American families. Many parents refuse to hook up to the Internet in order to protect their families.

Congress took steps to protect children by enacting the Communications Decency Act. Clearly the government has a compelling interest in protecting minors from at least some sexually explicit material. Additionally, the government has a compelling state interest in having parents and children using what has become an unparalleled resource for communicating and obtaining information.

The statute is not vague. The restrictions give sufficient warning concerning the core of what they prohibit. No part of the statute is directed at keeping indecent or patently offensive material away from adults who have a First Amendment right to obtain this speech. The undeniable purpose of this law is to segregate indecent material on the Internet into certain areas that minors cannot access.

Technology exists to require Internet users to enter information about themselves, such as an adult identification number or a credit card number before they can access certain areas of the Internet.

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The criminalization of transmitting obscene or indecent material to a user under the age of 18 is not overbroad. The statute indicated that the transmission to a minor must be made knowingly; that is, the person transmitting the information must know that the recipient is under 18 years old.

Likewise, the criminalization of the display of patently offensive material in a manner available to persons under 18 is not overbroad because the defenses to prosecution allow the defendant to use a credit card or adult identification number or some other effective steps to prevent children from accessing the prohibited material. The claim that there is no practical way for providers to verify age fails since content providers may use adult verification services, such as AdultCheck, which costs a nominal fee of less than $10 per year.

Finally, Congress made the judgment that it is better to place the burdens and costs on those who disseminate or display patently offensive material than to leave children wholly unprotected. The law is constitutional.

Opinion B

The Communications Decency Act is clearly unconstitutional. The act's indecent transmission and patently offensive display provisions violate freedom of speech protected by the First Amendment. This law differs from other cases in which the Supreme Court has upheld restrictions on minors' access to certain material.

Unlike those cases, this law does not give parents the ability to consent to their children's use of restricted materials, it is not limited to commercial transactions, it fails to define indecent, and it does not require that patently offensive material lack socially redeeming value. It does not limit its broad prohibitions to particular times or base them on an evaluation by a governmental agency familiar with the Internet's unique characteristics. It is punitive and it applies to a medium that, unlike radio, receives full First Amendment protection.

The lack of definitions for indecent and patently offensive will make speakers uncertain how the terms relate to each other and just what they mean. A mistake in interpretation can result in a felony conviction. This vagueness chills the exercise of free speech and makes it unlikely that the law has been carefully tailored to protecting minors from potentially harmful materials.

In its attempt to regulate speech that is potentially harmful to children, the law suppresses a large amount of speech that adults have a constitutional right to send and receive. Because there are less restrictive ways to protect children from harmful materials than this overbroad suppression of adult speech, the statute is unconstitutional. Currently available software allows a reasonably effective way for parents to prevent their children from accessing that which the parents believe is inappropriate.

The defenses provided in the statute are not narrowly tailored. The defense requires that the operators effectively block indecent materials. To date, there is no screening software that exists to do this. But even if it did exist, there is no way of knowing whether a minor might actually use the blocking software. The age verification defense also fails to pass constitutional scrutiny because it is not economically feasible for most noncommercial speakers.

The law is unconstitutional.

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Freedom of Speech on the Internet: Teaching Activities

Many libraries and schools have installed filters on their computers to restrict Internet access. The following activities for grades 10–12 provide opportunity for students to think about their speech rights in the context of the Internet and to apply various legal principles to fashion solutions for student Internet use. The activities could extend over several days. For example, a resource person such as a lawyer or judge might be invited to conduct one day's activities—say the opening discussion of First Amendment principles or the final City Council role play. Summaries of some key cases and legal materials are set out in "Free Speech Legal Background Handout" for use with the following activities. The ABA's Youth Summit site on Freedom of Speech and the Internet—http://www.abanet.org/publiced/youth/spring00main.html—has a wealth of other information, including other First Amendment cases, positions of interest groups, and other lessons. If time permits, read key cases in their entirety for preparation and select key passages to photocopy and share with the students when the cases and legal concepts are presented and discussed.

Objectives

As a result of these activities, students will

- Consider and learn about the scope of their right to free speech outside and inside schools;
- Understand and apply free speech concepts to student use of the Internet; and
- Deliberate whether and to what degree there should be limits on children's access to materials on the Internet or Internet use in public libraries and explore the policy making process.

Procedures

Introductory Discussion

Begin with some questions.

- Do people have a right to free speech?
- How do you know people have a right to free speech? (First Amendment)
- What does the right to free speech mean? (Can you yell "Fire!" in a crowded theater?)
- Why is the right to free speech so important? (Historical background of First Amendment and First Amendment today)

Activity 1: Free Speech Background

Pass out *Free Speech Handout* on page 36. Have students read and discuss examples in pairs or small groups and then discuss their opinions with the class as a whole. Discuss the legal principles and definitions relevant to the examples (See "Terms and Vocabulary," pages 41–44).

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Activity 2: Free Speech on the Internet

1. Distribute *Free Speech Legal Background Handout.* Ask students to read the handout.
2. Raise the following questions with students: (a) Is communication on the Internet a form of speech that is protected by the First Amendment? Why or why not? (b) How should public libraries deal with student or youth use of the Internet? (c) Should filters be required for everyone, just people below a certain age, or no one?
3. Briefly explain to students how some schools and libraries use filters on their computers to block access to certain types of material. Filtering software generally uses preselected key words, Internet domains, or lists of Web addresses to block access to certain kinds of Web sites. A survey conducted in 1998 found that about 15 percent of all U.S. public libraries connected to the Internet were using filters on some of their terminals. Some libraries installed filters on Internet computers used only by children and labeled unfiltered terminals "adult only."
4. Do Internet filters work? According to a filter-evaluation project conducted by public librarians in 1997, key word blocking may prevent access to significant amounts of valuable information that wouldn't otherwise be restricted, such as that concerned with breast cancer and safe sex. Other methods of blocking are also not foolproof, but filters seem to work most of the time.

Activity 3: Group Work

1. Divide the class into six groups: five interest groups and the City Council. Write on the board or hand each group a slip of paper describing the position of the group to which they belong:
   - *American Civil Liberties Union*: Opposed to using filters because it violates free speech rights;
   - *Netparenting Group* (group of parents): Support use of filters to protect children from harmful information;
   - *American Library Association*: Opposed to using filters in public libraries because this violates the commitment of libraries to promoting free speech;
   - *Freedom for Research Club* (group of high school students): Oppose using filters on high school computers because this blocks access to important information for research;
   - *Parents Against Pornography*: Support using filters to protect young children from exposure to pornography; and
   - *City Council Members* (at least five students): Elected by the community to make laws concerning community matters. They need to make a decision about how to handle youth use of the Internet in public libraries. Each member will form his/her position as he/she listens to representatives of the other groups.
2. Have each group brainstorm the reasons for its position and several situations illustrating the positions.

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3. Give each group a short description about its position or ask the group to research the actual position on the Internet:
   - *American Civil Liberties Union* opposes Internet censorship because blocking software is notoriously clumsy and inevitably restricts access to valuable, protected speech; parents and teachers should provide young people with guidance about accessing the Internet; and filters in schools and libraries prevent children and adults without home computers from realizing the full potential of information available on the Internet.
   - *Netparenting Group* supports using filters because protecting children online should be a #1 goal; adult sites are added to the Web at an alarming rate; hate groups and cults have sites and no child should ever be exposed to these radical beliefs at such a young age; and when young children see bad words on the Net, they begin to think it's okay.
   - *American Library Association* opposes using filters in library computers because Internet communications deserve the same level of Constitutional protection as books, magazines, newspapers, and speakers on a street corner soapbox; courts support the importance of enabling individuals to receive speech from the entire world and to speak to the entire world; and libraries provide opportunities to many who would not otherwise have them.
   - *Freedom for Research Club* opposes using filters because filters prevent students from doing research on topics such as breast cancer and AIDS; and many students do not have Internet access at home and school and library computers are the only way they can research.
   - *Parents Against Pornography* supports using filters because restricting access to the Internet is the same as refusing to have *Playboy* and *Hustler* in schools and libraries; restricting access to the Internet is similar to placing limits on what can be shown on television; it is parents' responsibility to teach their children about sex; and children should not be exposed to pornography on the Internet.

Activity 4: Mock City Council Role Play Class Activity

1. Hold a City Council reception. Prepare name tags for each council member and each representative of each group.
2. Provide each *council member* with, or ask them to create, a notebook-paper checklist listing the five interest groups, which the council members will use to keep track of which interest groups they have talked with. Provide each *interest group representative* with, or ask students to create, a checklist listing each council member to check off after talking with the member.
3. Have students playing the *interest group representatives* circulate to talk with the council members. Each interest group representative should voice its position regarding filters and the reasons for the positions. (Encourage students to use their own brainstormed ideas, research, or the short descriptions from above, depending on how you have approached

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previous activities.) They should try to convince the council members to vote in favor of their position. They should also ask the council members for a commitment. On their checklist, interest group members can note whether they have a council member's support for their position.

4. Hold a brief City Council meeting in which council members publicly discuss among themselves the issue of Internet filters. Depending on available time, representatives of the interest groups may make comments or statements. Council members conclude their deliberations by taking a vote.
5. Ask students to step out of their roles and discuss their personal feelings regarding the use of filters. Ask students to give their observations and reactions to the City Council reception and vote. Discuss the difference between having filters in school computers and library computers. Take a vote of how many students would support using filters on all school computers, on some school computers, on all library computers, on some library computers. In this discussion, ask students how the various legal principles influenced their decisions.

Activities developed by Richard L. Roe and Lorraine Bellard.

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Free Speech Legal Background Handout

First Amendment, U.S. Constitution. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government of a redress of grievances. The First Amendment to the U.S. Constitution, 1791.

***Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726 (1978).** The U.S. Supreme Court upheld the FCC's ruling against a radio station that broadcast a comedy routine by George Carlin about the seven "filthy words" kept out of polite conversation. In the routine, Carlin repeatedly used the filthy words. The broadcast took place during the evening rush hour. A parent driving with his children and listening to the broadcast on his car radio complained about the bad language. The majority found the words "vulgar," "offensive," and "shocking," and said that the time of the broadcast, when children may likely be listening, was a major factor in the decision."

***Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997).** The U.S. Supreme Court held that the Communications Decency Act (CDA) was an unconstitutional burden on adult speech. The CDA prohibited knowingly making available obscene or indecent messages to a person under 18 years of age. Although the government has an interest in protecting children, the CDA suppressed a broad range of constitutionally protected speech for adults.

***Loudoun v. Board of Trustees of the Loudoun County Library,* 24 F. Supp 2d 552 (E.D. Va. 1998).** A U.S. district court held that a county policy requiring filters on all of its public library Internet computers was an unconstitutional restriction of free speech.

Free Speech Handout

Can you "say" anything you want, anywhere you want to? What are the limits?

1. Candidate says, "I believe my opponent lacks good moral quality."
2. Advertisement: "Clear Face kills acne germs." It doesn't.
3. Photographs of nude children.
4. License plate required by state, "Live Free or Die."
5. Said to White House guard, "I'm here to kill the President."
6. News article says "Rick Roe beats his wife and children." He doesn't.
7. A fraternity hangs out a Confederate flag on the Martin Luther King Jr. holiday.
8. Book: *How to Be a Hit Man.*
9. A person taunts, "Your mother ****."
10. A candidate blares his message from a sound truck at 3 A.M. in a residential neighborhood.

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Additional Teaching Resources

Web Sites

American Bar Association Division for Public Education National Online Youth Summit Web Site "Should Youth Access to the Internet and Mass Media Be Restricted?"
http://www.abanet.org/publiced/youth/spring00main.html
This site offers links to many relevant First Amendment resources, including key court decisions.

American Civil Liberties Union
http://www.aclu.org/index.html
The A.C.L.U. has challenged Web regulation legislation in the states and on the federal level. The site includes detailed information about these cases and links to important decisions of the courts.

American Family Values Association
http://www.afa.net/about.asp
An advocacy organization that describes itself as being concerned with "traditional family values, focusing primarily on the influence of television and other media—including pornography " in society.

American Library Association
http://www.ala.org/
The site, and the pages for its Office for Intellectual Freedom in particular, provides information about First Amendment issues, the Communications Decency Act (1996), the Child Online Protection Act (1998), challenged and banned books, and notable First Amendment Court cases, including *Reno v. A.C.L.U.* and *Ashcroft v. A.C.L.U.*

COPA Commission Web Site
http://www.copacommission.org/
The COPA Commission was a congressionally appointed panel mandated by the Child Online Protection Act (1998). The primary purpose of the commission was to "identify technological or other methods that will help reduce access by minors to material that is harmful to minors on the Internet." Includes link to the commission report.

First Amendment Cyber Tribune
http://w3.trib.com/FACT/
Hosted by the *Casper Star-Tribune* and edited by Charles Leyendosky, this site provides links to and information about First Amendment freedoms and includes a section devoted to the Internet.

The Freedom Forum
http://www.freedomforum.org/
This site is a good source of information about First Amendment issues, including Web First Amendment issues.

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National Coalition Against Censorship
http://www.ncac.org/
Offers information about censorship issues and the Internet from an anticensorship perspective.

The National Law Center for Children and Families
http://www.nationallawcenter.org/default.htm
This center's mission is to protect children and families from the effect of illegal pornography in law enforcement and law advocacy.

Print Resources: Books

Bleep! Censoring Rock and Rap Music edited by Betty Houchin Winfield and Sandra Davidson, Greenwood Press, 1999. Examining the various boundaries of American artistic tolerance, chapters address the societal and legal responses to rock and rap music. Inhibitions and censoring, it is argued, stem from adult concerns for a healthy functioning society and from anxiety about the impact of sexual explicitness and uncontrolled behavioral expression on adolescents.

Censorship: Opposing Viewpoints edited by Bradley Steffens, Greenhaven Press, 1996. This book of opposing viewpoints designed for classroom use looks at the concerns on each side of the censorship debate. Do restrictions on the flow of ideas deprive people of the information they need to maintain a free and open society? When expression endangers society or attacks an individual, is censorship justified? Includes critical thinking skill activities and bibliographies. Reading level: 5–8. Interest level: Young Adult.

Cyber Rights: Defending Free Speech in the Digital Age by Mike Godwin, Times Books, 1998. This book discusses legal issues and the Internet, including the U.S. Supreme Court decision about the Communications Decency Act (1996).

The Internet and the First Amendment: Schools and Sexually Explicit Expression by Fred H. Cate, Phi Delta Kappa Educational Foundation, 1998. Cate identifies the legal issues surrounding minors' access to sexually explicit material and discusses the ramifications of controlling and regulating that access, citing many court rulings and statutes.

Justice Talking: Censoring the Web: Leading Advocates Debate Today's Most Controversial Issues edited by Kathyrn Kolbert and Zak Mettger, New Press, November 2001. Prominent attorneys debate Web censorship in a book-and-CD series inspired by the National Public Radio program *Justice Talking*. The set includes the complete audio recordings and transcripts of the *Justice Talking* debate about online pornography and the Child Online Protection Act between American Civil Liberties Union President and law professor Nadine Strossen and Bruce Taylor, executive director of the National Law Center for Children and Families; a history of related First Amendment law; and a comprehensive overview of the arguments for and against the Communications Decency Act and other laws regulating sexually explicit material on the Web. The book also contains a range of supplementary primary source documents.

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Media Violence: Opposing Viewpoints edited by William Dudley, Greenhaven Press, 1999. Chapters in this book intended for classroom use include "Is Violence in the Media a Serious Problem?" "Should the Government Restrict Media Violence?" "How Should Society Respond to Media Violence?" "Does Media Violence Have Artistic Value?" Includes critical thinking skills activities. Reading level: Young Adult. Interest level: Young Adult.

Sex, Laws, and Cyberspace by Jonathan D. Wallace and Mark Mangan, M & T Books, 1996. Reviews cyberspace censorship cases, including the context for and U.S. Supreme Court decision about the Communications Decency Act (1996).

Sex, Sin and Blasphemy by Marjorie Heins, The New Press, 2000. This book offers an analysis of the legal underpinnings of the concept of free expression, censorship, art, and popular culture by the founding director of the Arts Censorship Project of the A.C.L.U.

Print Resources: Articles

"A Complex New Medium That Will Be Hard to Regulate" by Steve Lohr. In *The New York Times*, June 13, 1996. The article discusses the district court ruling about the Communications Decency Act.

"Censor's Sensibility (Internet Censorship and Filters)," by Michael Krantz. In *Time* (August 11, 1997) 157(6): 48. The article describes use of Internet blocking software in settings ranging from private companies to libraries and the types of information that it blocks.

"Free Speech Breaks Loose in Cyberspace: A Court Ruling Unchains the Internet Industry." In *U.S. News & World Report* (June 24, 1996), 120(25): 57. Article includes discussion of the federal court ruling on the Communications Decency Act (1996).

"Free Speech for the Net: A Panel of Federal Judges Overturns the Communications Decency Act," by Joshua Quittner. In *Time* (June 24, 1996), 147(26): 56. The federal court decision in the Communications Decency Act (1996) is discussed.

"*Reno, Attorney General of the United States et al. v. American Civil Liberties Union et al.*, 521 U.S. 844 (1997), Supreme Court Docket No. 96-511," from the American Bar Association, in *Preview of United States Supreme Court Cases*, No. 8 (July 8, 1997): 68–69. This article discusses the Supreme Court decision in *Reno v. A.C.L.U.*

"Statute on Internet Indecency Draws High Court's Review" by Linda Greenhouse. In *The New York Times*, National Desk, December 7, 1996. The Communication Decency Act and the federal court decision about the act are described in the article.

"What Level of Protection for Internet Speech?" by Linda Greenhouse. In *The New York Times*, March 24, 1997. The author describes the hierarchy of protected speech under Supreme Court precedents, including the decision in *Reno v. A.C.L.U.*

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Videos

The following three videos are available for purchase from Films for the Humanities & Sciences. They are also available to rent. P.O. Box 2053, Princeton, NJ , 08543-2053, Phone: 800-257-5126.
Web site: http://www.films.com/

Cyberspace: Freedom or Regulation? (1996)
This video explores the issue of whether or not to regulate Internet content the same way that the FCC regulates television and radio. Policy experts featured include Lance Rose, author of *NetLaw*; Patrick Sullivan, executive director of the Computer Ethics Institute; and Cathy Cleaver, director of Legal Studies at the Family Research Council. 29 minutes. VHS. Price: $89.95. Films for the Humanities & Sciences.

Free Speech, Politics, and the Web (1998)
This video discusses the technologies that cyberworld pioneers developed and takes the position that, for better or for worse, the Information Superhighway and uncensored discourse are here to stay. 30 minutes. VHS. Price: $129.00. Part of the series *The Web Story*. Films for the Humanities & Sciences.

Technology and Pornography (2001)
This ABC News program seeks to explain the prosecutorial status of computer-generated sexual imagery as defined by the Child Pornography Prevention Act. 22 minutes. VHS. Price: $89.95. Films for the Humanities & Sciences.

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Terms and Vocabulary

Absolute freedom

An absolute freedom is a freedom that has no limitations.

Amicus brief

The term comes from the Latin *amicus curiae,* meaning "friend-of-the-court." In some cases, especially in those that have been appealed, other persons besides the persons directly involved may have an interest in the outcome. Interest groups may file a legal brief with the court supporting one position or another on the behalf of these persons. When persons or organizations file *amicus curiae* briefs, they usually suggest that the court's decision will have an impact on them or society in general that the court should consider when making a decision. Often referred to as a "friend-of-the-court" brief.

Bill of Rights

Refers to the first ten amendments to the U.S. Constitution.

Blasphemy

The act of insulting or showing a lack of reverence for God, or showing a lack of reverence toward something considered sacred, not liable to doubt, attack, or question.

Censorship

Review of books, movies, or other forms of expression to prohibit publication, viewing, or distribution, usually for moral or state security reasons.

Clear and present danger test

After the Civil War, the courts considered how speech that might lead to or incite overthrow of the government, and they decided that even a small relationship justified imprisonment. This legal policy is often referred to as the "clear and present danger" test.

Common law

Developed in England as law common to the whole of England during the time of King William I (1066–1087), also known as William the Conqueror. Before that time, different local laws ruled different areas. Common law consists of rules based on common custom and usage. As courts developed, common law came to include judges' decisions in written reports. English common law is the basis for law in the United States.

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Comstockery

Censorship of obscene materials or opposition to alleged immorality. The term was coined from the name of Anthony Comstock, an anti-obscenity crusader of the nineteenth and twentieth centuries.

Criteria

Standards on which a decision or judgement is made; also, characteristics or traits.

Defamation

Speech that injures a person's character or reputation through false and malicious statements.

Hicklin test

A legal standard adopted by American law that was used until the mid-twentieth century. The standard originated with an 1868 English court case, *Regina v. Hicklin*, in which a judge decided that obscenity of a book could be determined on the basis of a reading of a single passage rather than the publication as a whole.

Interstate commerce

The movement of goods across state lines in the United States. Under the U.S. Constitution, the federal government has the power to control and regulate interstate commerce.

Judicial review

Judicial review is the process by which courts review the laws and actions of local, state, or national governments to determine if they are constitutional.

Legal brief

A written statement prepared by one side in a lawsuit to explain to the court its view of the facts of a case and the laws that apply to it.

Libel

Libel is written defamation or published false and malicious written statements that injure a person's reputation.

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Minor

Someone who has not reached the legal age of an adult, as prescribed by statute. The age frequently varies for different purposes. A person might be permitted to marry without parental consent at the age of 18 but may not be able to purchase alcoholic beverages until the age of 21.

Ordinance

A law established by a governmental authority. The term often refers to a local or municipal regulation; for example, local zoning ordinances often control the sites of businesses such as adult theaters or bookstores.

Overbroad

If a law designed to limit activities not protected by the Constitution is written more broadly than necessary, it may be considered unconstitutionally overbroad by the courts. To determine whether a law limiting speech is overbroad, the courts look at whether it is so broad that it would deter people from engaging in protected speech or is so broad that it might be used to arbitrarily deter political speech. The overbroad "test" may also be applied to other constitutionally protected rights, in addition to speech.

Precedent

A court decision on a question of law that gives direction to or authority on how to decide similar questions of law in future cases with similar facts. In the American court system, judges make decisions supported by past precedent rather than based on their own logic and reason; also, something that must happen before something else may happen.

Procedural due process

The right of people to enjoy certain constitutionally guaranteed procedures in the course of law; for example, if a person is accused of a crime, he/she must be (1) formally charged, (2) given a chance to defend himself/herself, and (3) judged in a court of law.

Pure speech

Pure speech is speech that involves words. When people choose to speak their ideas aloud or to write an essay, their expression takes the form of *pure speech*. *Pure speech* relies entirely on words.

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Seditious libel

The common-law tradition of punishing people for criticizing government officials.

Seditious speech

Speech that advocates the overthrow of the government.

Slander

Slander is verbal defamation, or the speaking of false and malicious words that injure a person's reputation.

Statute

A law passed by a legislative body.

Strict scrutiny test

Laws that restrict constitutionally protected activities are usually subject to what is referred to as the "strict scrutiny" or "least restrictive means" test. Under the strict scrutiny test, a law may be found unconstitutional if its basic purpose can be fulfilled through less restrictive strategies.

Substantive due process

The actual rights that a person has that are spelled out in the Constitution, such as the right to life, liberty, property, speech, press, religion, and assembly, and the right to petition government, as well as some additional rights not spelled out in the Constitution but interpreted through the courts as rights, such as the right to privacy during decision making.

Symbolic speech

Symbolic speech is speech that relies on actions or symbols instead of or in addition to words.

Vagueness

Courts may apply what is referred to as the "void for vagueness doctrine" to laws that restrict speech. If a law is considered impermissibly vague under this doctrine, it would restrict speech in terms that are so vague that they would include some protected speech. Laws that restrict expression must be very specific about what speech is illegal and what is not.

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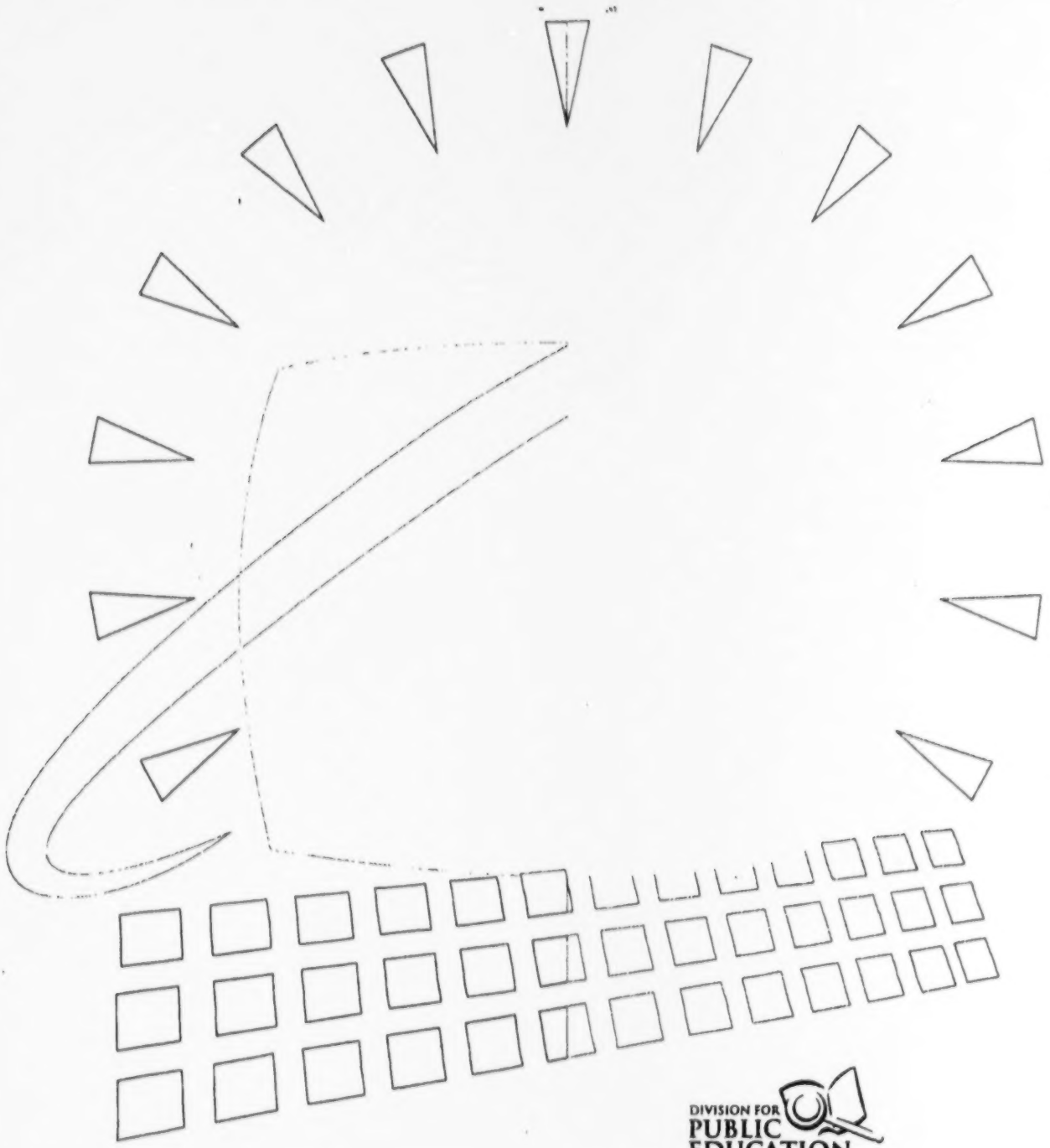

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